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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

OREGON MESABI CORPORATION,
Cross-Petitioner,

vs.

C. D. JOHNSON LUMBER CORPORATION,
Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Oregon Mesabi Corporation, respectfully shows that C. D. Johnson Lumber Corporation, appellee in the court below, has petitioned this Honorable Court for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit; and your petitioner, also considering itself aggrieved by the decision of said appellate court, respectfully submits the following cross-petition for such writ upon the grounds and for the reasons herein set forth.

A.

STATEMENT OF THE MATTER INVOLVED

By amendments, effected in 1920 and 1924, *Section 18 of Article I of the Oregon Constitution* was changed (as indicated by italics) to read as follows:

> "Private property shall not be taken for public use, nor the particular services of any man *be* demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; *provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use.*"
>
> (Note: The 1924 amendment added "waterways" and "water for beneficial use or drainage", which changes are not here pertinent.)

Chapter 2, Title 12, Oregon Compiled Laws Annotated, was enacted in 1921 to implement the 1920 constitutional amendment. This statute is set forth in Appendix A to this petition, together with pertinent procedural provisions of *Chapter 4* of the same title.

Insofar as said amendments to the Oregon Constitution, and the provisions of *Chapter 2, Title 12, O. C. L. A.,* are so construed as to authorize the taking of private property for exclusively private uses, or without just compensation, the application of *Section 1 of the Fourteenth Amendment to the Federal Constitution* is also involved herein.

Petitioner (hereinafter referred to as "Mesabi") is a Delaware corporation and the owner of a block of virgin old growth timber on Euchre Creek, in Northern Lincoln County, Oregon, comprising approximately 4600 acres. C. D. Johnson Lumber Corporation, a Nevada

corporation (hereinafter referred to as "Johnson"), owns a timber tract of 1160 acres, bounded on three sides by Mesabi's holdings but, nevertheless, accessible to the state highway along the Siletz River, over two existing roads crossing Johnson's own cut-over lands and connecting said tract with the highway (R. 699 and 718)*.

In July, 1945, under the statutes set forth in Appendix A, Johnson instituted an action, in the Circuit Court of the State of Oregon for Lincoln County, to condemn a strip of land 60 feet in width and 5807.4 feet in length, for a logging road through Mesabi's timber. Concurrently, another action was instituted to condemn a similar strip, 1367.6 feet in length, for a branch road extending northerly from a junction on Mesabi's land. Both actions were removed to the District Court of the United States for the District of Oregon, on the ground of diversity of citizenship.

Item	*Case 11569*	*Case 11570*
Complaint	2- 8	2-3
Removal proceedings	8-22	4-6
Amended complaint	35-41	8-9

The following issues, among others, were raised by sundry motions, pleadings, and objections in the trial court, and by assignments of error on appeal.

(1) The public use and purpose of the taking ..... (Pages 46, 53, 616)

(2) The necessity for the taking..... (42, 46, 53, 620)

(3) The identity of the property condemned:

(a) As to location of rights-of-way ..... (311-319, 365-374, 619, 626-627, 714, 716)

(b) As to nature and extent of rights taken ..... (42, 127-128, 660-662)

Note (*): Unless otherwise indicated, all references to the record refer to the record in the case identified by Docket No. 11569 in the court below.

(4) The statutory authority for Johnson to condemn Oregon lands.. (45, 616)

(5) The admissibility of certain evidence of fair market value.. (480, 631, 633-635)

(6) The propriety of the court's instructions to the jury (635-646); as to the nature and extent of the property rights condemned. (650-652)

The cases first came on for consolidated trial before the court on the issue of necessity for the taking (R. 183-304), whereupon the District Court found that the taking was necessary, directed the submission of the question of damages to a jury, and ordered that judgment of appropriation and condemnation be entered (R. 79).

The ensuing trial by jury resulted in one verdict for $2550.00 for damages for the taking of the right-of-way for the so-called main road (R. 11569, pages 86-88), including timber thereon valued at $2511.00. By a separate verdict, damages in the sum of $6.00 were awarded for the taking of the right-of-way for the branch road (R. 11570, pages 20-21). Judgments were entered on said verdicts wherein it was ordered that the land described in each complaint, respectively,

> "be and the same hereby is condemned and appropriated to the plaintiff as a right of way for a logging road and said lands are appropriated and vested in the said plaintiff as an unlimited easement with the right to the exclusive use thereof, subject to the right of the defendant, Oregon Mesabi Corporation, to make such necessary crossings of said right of way as will not unreasonably interfere with the use of said right of way by plaintiff."
>
> (R. 11569, pages 93-100.)
>
> (R. 11570, pages 22-28.)

Thereupon Johnson, having paid into court the full amounts of the judgments and costs, took exclusive pos-

session of the lands condemned and has since enjoyed the exclusive occupancy and use thereof, in accordance with the provision of *Section 12-409, O. C. L. A.* (Appendix A). Mesabi is thereby deprived of the use of the most feasible route for transporting 200 million feet of its timber, and cannot log the timber abutting on approximately one and one-half miles of Johnson's roads, without interfering with Johnson's use thereof, or incurring exorbitant expense (R. 561-590). The damages awarded and deposited in court covered only the value of the lands and timber actually taken, and no damages to the property not taken.

From these judgments appeals were taken to the United States Circuit Court of Appeals for the Ninth Circuit, upon the errors assigned and specified on pages 11-18 of Appendix (1) to Brief of Cross-Petitioner, filed herewith.

In its decisions rendered on December 12, 1947, the Circuit Court of Appeals reversed the judgments of the District Court and ordered new trials. Your petitioner contends that both cases should have been dismissed for the reasons that (1) the complaints did not state causes of action, (2) there was no necessity for the taking, (3) the taking was contrary to law, (4) the condemnor was not such a foreign corporation as is specifically authorized by Oregon law to exercise the power of eminent domain, and (5) the irregular strips of land described in the complaints and judgments had not been surveyed and located on the ground so as to enable the appellant-defendant and its value witnesses to identify the same with reasonable certainty.

Issues involved in the controversy, on which the Circuit Court of Appeals ruled adversely to your petitioner, and which petitioner seeks to have reviewed by your Honorable Court, are indicated herein under "Questions Presented".

B.

BASIS OF JURISDICTION

Jurisdiction is invoked under *Section 240 (a) of the Judicial Code,* as amended by *Section 1 of Chapter 229 of the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. § 347 (a),* and this petition is presented under Rule 38 of this Court.

The opinions of the Circuit Court of Appeals for the Ninth Circuit were filed December 12, 1947, and judgments were entered on that date. The decisions have been released for publication, but citations are not yet available. Petitions for rehearing were denied on March 3, 1948. Orders staying the mandates to and including April 12, 1948, pending application for writs of certiorari, were entered on March 8, 1948.

C.

QUESTIONS PRESENTED

The questions for review are as follows:

(1) Is the taking of the most feasible route for logging the owner's block of timber, by the owner of adjacent timberlands, for the exclusive use and benefit of the latter in the removal of such adjacent timber, a valid exercise of the right of eminent domain under *Section 18 of Article I of the Oregon Constitution,* as interpreted by Oregon courts?

(2) Is such taking, under the circumstances indicated, and the proceedings recorded, violative of Section 1 of the *Fourteenth Amendment to the Constitution of the United States?*

(3) Under the provisions of *Section 18 of Article I of the Oregon Constitution,* and *Section 12-207, Oregon Compiled Laws Annotated,* is the owner of lands abut-

ting on a state highway entitled to condemn rights-of-way for logging roads over a neighbor's lands without other proof of necessity than a showing that the same would be more economical to construct, and more convenient to operate, than extensions of its own roads over its own lands?

(4) May the condemnor, upon a new trial ordered by an appellate court, diminish the compensation for the property taken, by relinquishing to the original owner and the general public the exclusive rights already appropriated, taken, and used, under *Section 12-409, O. C. L. A.* (Appendix A), by:

(A) Amending its complaint to describe lesser rights;

(B) Procuring a new order of necessity for the appropriation of an "ordinary easement";

where the following conditions exist?

(a) *Chapter 2, Title 12, O. C. L. A.*, authorizes the taking of "land", subject to reversion of title for non-user (Appendix A);

(b) The highest court of the state has sanctioned the taking of a qualified fee title for right-of-way purposes (*Coos Bay Logging Co. v. Barclay*, 159 Or. 272, 79 P. 2d 672);

(c) The condemnor, by amended complaint, has sought to take the lands therein described and all of the owner's interest therein (R. 35-40);

(d) The condemnor has committed itself, in open court, to take such land and interest as are demanded in the amended complaint (R. 127-128);

(e) The owner has made no objection as to the quantum of title taken (knowing that it could make no practical use of any rights reserved, without interfering with the condemnor's use of the right of way);

(f) Value witnesses for both parties, at a jury trial for the assessment of damages, based their testimony upon the assumption that the condemnor was taking the land (and all timber thereon), and all of the owner's interest therein, except the reversionary title;

(g) The judgment decreed that the land therein described be "condemned and appropriated to the plaintiff as a right of way for a logging road, and said lands are appropriated to and vested in the said plaintiff as an unlimited easement with the right to the exclusive use thereof, subject to the right of the defendant, Oregon Mesabi Corporation, to make such necessary crossings of said right of way as would not unreasonably interfere with the use of said right of way by plaintiff" (R. 96-98;

(h) An appeal was taken from the judgment, but the condemnor, in the interim, paid the amount of the award into court, entered into possession of the condemned land, under the authority of *Section 12-409, O. C. L. A.* (Appendix A), and has occupied the same for its sole and exclusive use and benefit, during the pendency of such appeal and subsequent appellate proceedings, to the exclusion of the owner and the general public.

(5) What significance (if any) has the term "right-of-way", with reference to the quantum of title or extent of interest taken under eminent domain? (R. 747-748.)

(6) Under the Oregon Act of October 21, 1878 *(General Laws, 1878, page 95)*, may a foreign corporation, not of any specific class therein or elsewhere expressly authorized to exercise the right of eminent domain, condemn property in the State of Oregon?

D.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I.

The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

Whether, under the power of eminent domain, the most feasible route for logging a block of timber may be taken from the owner, by a private owner of adjacent timberlands otherwise accessible over its own roads, for the *exclusive* use and benefit of the condemnor, has not been determined by this Court.

In recognizing, as a proper exercise of the power of eminent domain, the condemnation of property for use in developing mines, arid lands, and water power, this Court has not gone so far as to hold that land may be taken for private logging roads.

On the contrary, the question has been reserved, expressly or by implication, in the following cases:

> *Hairston v. Danville & W. R. Co.*, 208 U. S. 598, 607; 52 L. ed. 637, 641.
>
> *Clark v. Nash*, 198 U. S. 361, 369; 49 L. ed. 1085, 1088.
>
> *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 159; 41 L. ed. 369, 389.

The question is important for the reason that it involves the application of *Section 1 of the Fourteenth Amendment to the Federal Constitution*, and for the further reason that the conservation and protection of the nation's diminishing timber supply are important "public uses".

While the precise question does not appear to have been settled by this Court, the decision of the Circuit Court of Appeals is apparently in conflict with principles announced by this Court in the following cases:

Missouri Pacific Ry. Co. v. Nebraska, 164 U. S. 403, 417; 41 L. ed. 489, 495;

Citizens Savings & Loan Co. v. Topeka, 20 Wall. 655, 664; 22 L. ed. 455, 461;

and other cases going back to the decision of Mr. Justice Story in *Wilkinson v. Leland,* 2 Pet. 627, 657; 7 L. ed. 542, 553.

II.

The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions in the following cases:

As to the public purpose of the taking:

Witham v. Osburn, 4 Or. 319, 322, 323;

Bridal Veil Lumbering Co. v. Johnson, 30 Or. 205, 209; 46 P. 790, 791;

Apex Transportation Co. v. Garbade, 32 Or. 584, 587; 52 P. 573, 574 (54 P. 367), 62 L. R. A. 513;

City of Dallas v. Hallock, 44 Or. 246, 252; 75 P. 204, 206;

Grande Ronde Electrical Co. v. Drake, 46 Or. 243, 248; 78 P. 1031, 1033;

Anderson v. Smith-Powers Logging Co., 71 Or. 276, 290; 139 P. 736, 741; L. R. A. 1916B 1089;

State v. Hawk, 105 Or. 319, 326; 208 P. 709, 712 (209 P. 607);

Smith v. Cameron, 106 Or. 1, 7-19; 210 P. 716, 718-722 (262 P. 946);

Barkley v. Gibbs, 44 Or. Adv. Shts. 411; 178 P. 2d 918, 919;

Coos Bay Logging Co. v. Barclay, 159 Or. 272, 294; 79 P. 2d 672, 681;

(In the case last cited, the Oregon court clearly indicated that "changes in the Constitution have not altered the rule that, whether the proposed use is in fact public, it is a question for the determination of the court.")

III.

The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

As a step in the due process of law, to which the owner was entitled before being deprived of its property, the court below should have decided all the issues properly presented by appellant's assignments of error, thereby providing proper guidance for the District Court in the conduct of the new trials which were ordered. In this the reviewing court failed in the following particulars:

(a) Instead of determining the important judicial question of whether the *particular taking* was, under the facts and circumstances disclosed by the record, for such a *public use* as to constitute a proper exercise of the power of eminent domain, the court below merely indicated that the *enactment of Chapter 2, Title 12, O. C. L. A.,* was *"a proper exercise of eminent domain."* (R. 744-745.)

(The Oregon cases cited in Paragraph II (a) hereof, and the decision of this Court in *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112, 159-160; 41 L. ed. 369, 389, indicate that whether the taking is for a public use must be determined from the facts and circumstances of each case.)

(b) In agreeing "with the trial court in its exclusion of evidence on damages * * * offered by Mesabi on the theory that what Johnson sought was a qualified fee" (R. 747-748), the court below was in error, no such evidence having been excluded for the reason stated. The Court failed to pass upon the exclusion of the testimony of a value witness (R. 631) on grounds which did not involve the quantum of title, but did involve the application of the "before and after" rule for determining "fair market value" (R. 462-464), and the factors properly entering into such determination (R. 480). This obvious error of the trial court was an important factor in depriving Mesabi of just compensation, and may be repeated at any future trial.

Oakland Water Front Co. v. Le Roy (C. C. A. 9), 282 F. 385, 386-7;

Orgell, Valuation under Eminent Domain, Sec. 55.

(c) The court below failed to indicate how the location and description of the lands (R. 751-752), and the quantum of title and extent of interest therein sought to be taken (R. 748), were to be determined in advance of new trial, in order to avoid the confusion and uncertainty incident to the original trials (R. 660-662).

(d) The court below (and the trial court) used the term "right-of-way" (R. 747-749) as indicative of an easement, or a quantum of title or interest less than a fee, whereas the term has no such significance, and its use tends to confuse the issues to be tried again.

18 Am. Jur. 745 and *155 A. L. R. 381, 390-405* (Annotation);

Missouri, Kansas & Texas Ry. Co. v. Roberts, 152 U. S. 114, 116; 38 L. ed. 377, 379;

New Mexico v. United States Trust Co., 172 U. S. 171, 181-185; 43 L. ed. 407, 411-412;

Western Union Telegraph Co. v. Pennsylvania R. R. Co., 195 U. S. 540, 570; 49 L. ed. 312, 323.

(e) In directing a redetermination of the quantum of title to be taken, with a view to possible diminution of damages by the ultimate appropriation of inferior rights and interests (R. 750), the court below apparently overlooked the fact that the exclusive rights awarded by the judgments below had already been taken, and used and enjoyed by the condemnor for more than a year.

Section 12-409, O. C. L. A. (see Appendix A);

29 C. J. S. 1015 (citing Coos Bay Logging Co. v. Barclay, 159 Or. 272, 79 P. 2d 672);

Behle v. Loup River Public Power Dist. (Neb.-1940), 293 N. W. 413;

Moll v. Sanitary District of Chicago, 228 Ill. 633, 81 N. E. 1147.

(f) In holding that a Nevada corporation was entitled to condemn Oregon lands (R. 745), the court below nullified *Section 77-320, O. C. L. A.*, grounding its decision on reasons of public policy, premised on conditions not shown to exist by the record, or by common knowledge, and overlooked the circumstance that *Section 77-318, O. C. L. A.*, was inadvertently separated from *Section 77-320, O. C. L. A.*, in the process of codifying *General Laws, 1878, page 95* (see Appendix B), and should be considered in connection with the original context.

Oregonian Ry. Co. Ltd. v. Oregon Ry. & Nav. Co. (C. C.-Oregon-1885), 23 F. 232, 238-239.

The entire record indicates that this litigation, wherein a private industrial corporation seeks to exercise sovereign rights, has so far departed from the normal course that the intervention of this Court is necessary to restore orderly procedure.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, full and complete transcripts of records and all proceedings in the cases numbered and entitled on its docket

No. 11569 Oregon Mesabi Corporation, a corporation, Appellant, vs. C. D. Johnson Lumber Corporation, a corporation, Appellee;

No. 11570 Oregon Mesabi Corporation, a corporation, Appellant, vs. C. D. Johnson Lumber Corporation, a corporation, Appellee,

and that the said judgments of said Circuit Court of Appeals may be so modified by this Honorable Court as to direct a dismissal of said actions, by the District Court of the United States for the District of Oregon, and that your petitioner may have such other and further relief in the premises as may seem meet and just.

OREGON MESABI CORPORATION,

By JOHN A. LAING

and HENRY S. GRAY,
Counsel for Petitioner.

LAING GRAY & SMITH,
JOHN R. BECKER,
Of Counsel.

APPENDIX A

Excerpts from Oregon Compiled Laws Annotated.
Condemnation for Logging Roads.
(Chapter 2, Title 12, Codified from Oregon Laws, 1921, Chap. 357, §§1-7.)

§12-201. "Any person, firm or corporation, who shall require land for transportation of the raw products of the forest may file with the county clerk of the county in which said land is located a statement showing the approximate route of any proposed road or railway and a general description of the tract which said road or railway may travel, and at the same time may file with the clerk of said county a bond in such sum as may be fixed by order of the county court, conditioned upon the payment to the owner or owners of the lands required for said road or railway, of any and all damage which the owners may sustain by reason of entry upon said land for the survey or location of said road or way. When said bond has been filed, such person, firm or corporation shall have the right to enter upon said tract for the purpose of examining, locating or surveying the line of such road or logging railroad."

§12-202. "Any such person, firm or corporation shall have the right to acquire and own all lands reasonably necessary for said logging road or way to promote the transportation of logs or the raw products of the forests. If such person, firm or corporation is unable to agree with the owners of the land over which said logging railroad is necessary, as to the amount of compensation to be paid therefor, such person, firm or corporation shall have the right to condemn so much of the land necessary for such logging railroad, road or ways as may be necessary for the use of such way, road or logging railway, and may maintain a suit for the condemnation thereof in the circuit

court of the county wherein said lands are located; provided, that no land shall be taken hereunder until compensation therefor has been assessed and tendered as herein provided."

§12-203. "No more lands shall be appropriated under the provisions of this chapter than are reasonably necessary for the purposes specified in this act; provided, that no building nor the land upon which same is situated, which is exempt from execution as a homestead under the laws of the state of Oregon, shall be appropriated under the provisions of this act, nor shall any land belonging to the owner of said homestead be appropriated within 100 feet of said building."

§12-204. "Procedure for condemnation under the provisions of this chapter shall be the same, so far as practical, as set forth in sections 12-402 to 12-412, herein, both inclusive."

§12-205. "In assessing damages hereunder, full compensation shall be allowed for the value of the land appropriated and all other injury and damage which the owner may suffer by reason of the appropriation of said land; provided further, that the person, firm or corporation appropriating said land, and its successors and assigns, shall fence with a good and suitable fence both sides of said lands appropriated, in the event such lands are used for agricultural purposes, and shall take such other means and precautions reasonably necessary to protect the adjoining lands not appropriated from damage or injury by reason of the use of the lands appropriated for which it is to be used."

§12-206. "Any property acquired under the provisions of this chapter shall be used exclusively for the purposes set forth herein or such incidental purposes as may be necessary to the continued carrying out of the purposes

herein, and whenever the use of said property as herein contemplated shall cease for a period of two years, the same shall revert to the original owner, his heirs or assigns; provided further, that in assessing the damages the amount allowed shall not be in any manner lessened or decreased by reason of the possibility that said lands may revert to their original owner, as in this section provided."

§12-207. "Any logging road which is necessary for the transportation of a single tract of timber shall come within the provisions of this chapter, whether same be a common carrier or otherwise, and such road shall not come under the jurisdiction of the public service commission of this state unless the owners thereof shall declare it a common carrier."

CONDEMNATION PROCEEDINGS

Pertinent Excerpts from Chapter 4, Title 12, Oregon Compiled Laws Annotated.

§12-401. "Whenever any corporation authorized as in the provisions of this act, to appropriate lands, right of way, right to cut timber, or other right or easement in lands, is unable to agree with the owner thereof as to the compensation to be paid therefor, or if such owner be absent from this state, such corporation may maintain an action in the circuit court of the proper county, against such owner, for the purpose of having such lands, the right to cut timber, including the right to cross or intersect with a located but unconstructed line of railway, appropriated to its own use, and for determining the compensation to be paid to such owner therefor * * *." (Balance of section not pertinent.)

§12-402. "Such action shall be commenced and proceeded in to final determination in the same manner as

an action at law, except as in this title otherwise specially provided."

§12-403. (Not pertinent.)

§12-404. "The complaint shall describe the land, right or easement sought to be appropriated with convenient certainty. If the defendant, or either of several defendants, is a non-resident of this state or unknown, service of the summons may be made by publication as in ordinary cases." (Amendment added by Chapter 168, Oregon Laws, 1945, not pertinent.)

§12-405. (Not pertinent.)

§12-406. "The defendant in his answer may set forth any legal defense he may have to the appropriation of such lands or any portion thereof, and may also allege the true value of the lands and the damage resulting from the appropriation thereof."

§12-407. "Upon the motion of either party, before the formation of the jury, the court, upon the request of either party, shall order a view of the lands or premises in question, and upon the return of the jury the evidence of the parties may be heard and the verdict of the jury given."

§12-408. "Upon the payment into court of the damages assessed by the jury, the court shall give judgment appropriating the lands, property, rights, easements, crossing or connection in question, as the case may be, to the corporation, and thereafter the same shall be the property of such corporation."

§12-409. "Either party to the action may appeal from judgment therein, in like manner and like effect as in ordinary cases; but such appeal shall not stay the proceedings so as to prevent such corporation from taking such lands into possession, and using them for the pur-

poses of the corporation, or from proceeding to exercise the right, enjoy the easement, or make the crossing or connection condemned."

§12-410. "The costs and disbursements of the defendant, including a reasonable attorney's fee to be fixed by the court at the trial, shall be taxed by the clerk and recovered from the corporation, but if it appear that such corporation tendered the defendant before commencing the action an amount equal to or greater than that assessed by the jury, in such case the corporation shall recover its costs and disbursements from the defendant, but the defendant shall not be required to pay the plaintiff's attorney fee."

§12-411. "If a judgment in such action be reversed, and a new trial had, and at such second trial the jury assesses the damages of the defendant at a greater sum than before, the court shall, in addition to the judgment appropriating the lands, right, easement, crossing, or connection as provided in section 12-408, give judgment in favor of the defendant for such excess."

§12-412. "If the defendant accept the damages paid to the clerk, he waives his right of appeal, and if he do not, such sum shall remain in the control of the court, to abide the event of the appeal, and if the defendant or unknown owner of the land do not appear and claim the same, it shall be invested for the benefit of whom it may concern, as in case of unclaimed moneys in the sale and partition of lands."

APPENDIX B

Rights and Powers of Foreign Corporations. Oregon Laws, 1878, page 95.

AN ACT to authorize Foreign Incorporations to do Business and Exercise Their Corporate Powers within the State of Oregon.

Be it enacted by the Legislative Assembly of the State of Oregon:

Section 1. That any foreign incorporation incorporated for the purpose of constructing, or constructing and operating, or for the purpose of or with the power of acquiring and operating any railway, macadamized road, plank road, clay road, canal or bridge, or for the purpose of conducting water, gas or other substance, by means of pipes laid under ground, shall, on compliance with the laws of this State for the regulation of foreign corporations transacting business therein, have the same rights, powers and privileges in the exercise of the rights of eminent domain, collection of tolls and other prerogative franchises as are given by the laws of this State to corporations organized within this State, for the purpose of constructing any railway, macadamized road, plank road, clay road, canal or bridge, or for the purpose of conducting water by means of pipes laid under the surface of the ground. (Now embodied in Sec. 77-320, O. C. L. A.)

Sec. 2. Nothing in this act contained shall be so construed as to give to any foreign corporation or corporations, any other or further rights, powers or privileges than may be acquired or exercised by corporations incorporated under the laws of this State; but only so as to give to foreign corporations the same rights, powers and privileges, on a compliance with the laws of this State, as may be acquired or exercised by corporations incorporated under the laws of this State. (Now Sec. 77-318, O. C. L. A.)

Approved October 21, 1878.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

OREGON MESABI CORPORATION,
Cross-Petitioner,

vs.

C. D. JOHNSON LUMBER CORPORATION,
Cross-Respondent.

BRIEF IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

I.

OPINIONS BELOW

The opinions of the Circuit Court of Appeals for the Ninth Circuit were filed December 12, 1947, but do not yet appear in published reports.

(Case 11569, R. 742-752.)
(Case 11570, R. 62.)

II.

BASIS OF JURISDICTION

The date of the judgments to be reviewed is December 12, 1947 (Case 11569, R. 753; Case 11570, R. 63). Jurisdiction is invoked under *Section 240 (a) of the Judicial Code*, as amended by *Section 1 of Chapter 229 of the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. § 347 (a)*.

Note: *All emphasis, indicated by italics in this brief, is supplied by counsel.*

III.

STATEMENT OF THE CASE

A statement of the matters involved herein is set forth on pages 2-5 of the cross-petition.

For a proper understanding of the situation, however, these conditions should be noted:

(1) Heretofore Mesabi's block of virgin timber has been protected, by its isolation, against such conflagrations as devastated the Tillamook area to the north. A change in Mesabi's policy of conservation is now necessary. The invasion of this block by roads accessible to tourists, campers, hunters, and fishermen, with attendant fire hazards, together with Johnson's logging operations, which will expose Mesabi's timber to combustible slashings and "blow-down" over a front of more than five miles, tend to force early operations for the removal of exposed timber, including that abutting on the roads through Sections 11 and 14.

(2) The exclusive and unlimited rights vested in Johnson by the judgments of November 13, 1946 (R. 98), were the equivalent of a qualified fee title, for all practical purposes, regardless of the unorthodox terminology used in their designation. Theoretically, if Johnson now relinquishes these exclusive rights, the roads could be opened for the development of all the timber on Euchre Creek, and it is reasonable to assume that the amendment to the Oregon Constitution, like the Idaho Constitution, was intended to grant rights to an industry rather than to confer special privileges upon individuals (*Marsh Mining Co. v. Inland Empire Mining & Milling Co.*, 30 Ida. 1; 165 P. 1128, 1130). But a difficulty arises here from the fact that these roads traverse 400 acres of standing timber which it is impossible for Mesabi to log over these roads without *interfering* with the through transportation of timber cut

from adjacent tracts. Not only would some of the abutting timber have to be felled across these roads, but in order to conduct yarding, decking, and loading operations, according to the usual local methods, it would be necessary for Mesabi to install "donkey engines" on the roadways, and top and rig tall spar trees on or along the same, yard the timber onto the roadways by means of steel cables, and conduct loading operations on the roads, all of which would tend to block traffic temporarily.

The reason why joint user of a logging road is impracticable were fully explained by the Oregon court in the case of *Coos Bay Logging Co. v. Barclay,* 159 Or. 272; 79 P. 2d 672, 676-677. To use the hauling roads as logging roads, Mesabi would have to have prior and superior rights. Ordinarily it is assumed that a condemnor may make maximum use of rights-of-way and, for reasons explained in the Barclay case, an owner to whom certain rights were reserved would not be justified in spending money in anticipation of an opportunity to exercise such rights.

IV.

SPECIFICATION OF ERRORS

The United States Circuit Court of Appeals erred:

(1) In not holding that the taking of private lands, for the private purposes and exclusive uses of the condemnor, was not a proper exercise of the power of eminent domain under *Section 18 of Article I of the Oregon Constitution* (R. 744).

(2) In not holding that such taking was in violation of *Section 1 of the Fourteenth Amendment to the Constitution of the United States* (R. 744).

(3) In holding that such taking was necessary, under the circumstances, within the meaning of *Section 18 of Article I of the Oregon Constitution*, and *Section 12-207, O. C. L. A.* (R. 749).

(4) In holding that the condemnor is entitled to relinquish the exclusive rights, already taken under *Section 12-409, O. C. L. A.* (R. 749), and to amend its complaints, long after the actual taking, as a basis for appropriation of lesser rights, such as an "ordinary easement" (R. 748), and to have the damages for the taking mitigated accordingly (R. 750).

(5) In holding that a foreign corporation, not organized for any of the purposes specified in *Oregon General Laws, 1878, page 95*, is entitled to condemn Oregon lands under that law (R. 745).

(6) In failing to dispose of the issues, presented by assignments of error on appeal, in such manner as to guide the trial court, in the conduct of new trials, and thereby prevent the recurrence of obvious errors (R. 744-752).

IV.

ARGUMENT IN SUPPORT OF JURISDICTION ON CERTIORARI

1.

The question of whether the taking was for a public purpose should be reviewed by this Court.

The issue was evaded by the Court below (R. 744-745). It is important by reason of the invasion of rights reserved to citizens by *Section 1 of the Fourteenth Amendment to the Federal Constitution.*

The question has been reserved by the decisions of this Court in the following cases:

Clark v. Nash, 198 U. S. 361, 369; 49 L. ed. 1085, 1088.

Hairston v. Danville & W. R. Co., 308 U. S. 598, 607; 52 L. ed. 637, 641, and in *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112, 159-160; 41 L. ed. 369, 389, this Court indicated that such questions must be decided, in accordance with the Court's views of constitutional law, "on the facts and circumstances surrounding the subject-matter in regard to which character of the use is questioned," giving due respect to the decisions of the state court.

As a general rule, condemnation for a logging road for use of private parties in lumbering operations is not permissible.

18 Am. Jur. 707-709, Eminent Domain, Sec. 76.

Careful consideration of the decisions of the Supreme Court of Oregon, in the recent cases of *Coos Bay Logging Co. v. Barclay,* 159 Or. 272, 294; 79 P. 2d 672, 681, and *Barkley v. Gibbs,* 44 Or. Adv. Shts. 411; 178 P. 2d 918, indicates that the Oregon Court has not departed from the view, reiterated in the long line of decisions cited on page 10 of the foregoing petition, that "public use" means use by the public, and that a statute authorizing condemnation for a private road would be unconstitutional (178 P. 2d 919).

The Utah theory has been rejected by the Oregon Court, and the cases of *Clark v. Nash,* 198 U. S. 361; 49 L. ed. 1085, and *Strickley v. Highland Boy Gold Mining Co.,* 200 U. S. 527; 50 L. ed. 581, have no application for that reason, and for the further reason that the former involved the irrigation of arid lands, and the latter involved a tramway constructed to serve a mining district.

In the *Coos Bay Logging Company* case (supra) the railroad was designed to develop large tracts of timber under diverse ownership.

The present limitations of "public use" are indicated by the annotator in *54 A. L. R., at page 44,* as follows:

> "From the foregoing authorities, the following conclusions may be drawn: (1) It is erroneous to regard the authorities as divided, generally speaking, into two classes,—one taking the view that the terms 'public use' and 'public benefit' are synonymous under the law of eminent domain, and the other that a right of user by the public is essential to constitute a public use; (2) the general rule is that to constitute a public use there must exist a right of user on the part of the public, or some portion of it, or some public or quasi public agency, after the property has been condemned, and with this right of user is associated a right of regulation by the public so as to secure to it the expected benefits; (3) an exception to this general rule has been recognized by some courts in certain classes of cases, as those relating to mills, dams, water power, mining, irrigation, and perhaps drainage; (4) this exception seems to have arisen in the early mill and water-power cases, because of special economic conditions which have since largely changed; (5) the exception does not appear to have been extended beyond those cases in which property rights were fixed as to location, so that a necessity arose for an extension of the term 'public use,' which does not ordinarily exist in the case of business enterprises generally, as to which there is a choice of location, though one may be more convenient or advantageous than another; (6) the tendency has been to place the decisions, even in those classes of cases in which the exception is recognized by some courts, on other grounds than the law of eminent domain, to refuse to extend the public benefit doctrine, and to take the position that under present conditions, if the question were a new one, a different conclusion would be reached."

In *Sec. 315,* Mr. Lewis *(Eminent Domain, 3d ed.)* discusses the application of the Fourteenth Amendment, and indicates that the taking of private property "to promote the general welfare", is limited to (1) reclamation of wet or arid lands, (2) development of mines, and (3) development of water power.

Mr. Nichols *(Eminent Domain, 2d ed., page 120)* seems to consider it settled that property cannot be taken for private uses, and states *(pages 127-128)* that the Fourteenth Amendment is violated none the less where the state statute is authorized by the state constitution. This author suggests:

> "It is only recently that it has been realized that the public welfare is not served by an unlimited cutting down of timber and that the conservation of the remaining forest lands has become a subject of general interest."

Whether or not the cutting and removal of timber is a more important "public use" than its conservation and protection may depend upon what becomes of the end product. The record in this case does not show whether Johnson's lumber is utilized locally or shipped abroad.

2.

The question whether the taking was necessary should be settled by this Court.

The issue is closely related to that of public use. There are no Oregon decisions, interpreting the meaning of "necessary" as used in *Section 18, Article I of the Oregon Constitution,* and in *Section 12-207, O. C. L. A.*

Decisions holding that the condemnor is entitled to determine the location of a road, where the state or federal government or some governmental subdivision or agency thereof is seeking to take private property, do not appear

to be applicable where the location is left to individual whim, or to the action of officers or directors of a private corporation. Likewise cases holding that the condemnor can decide upon the route to be followed across the land of the condemnee are not applicable where the alternative route is on the condemnor's own land.

> "Where the authority is to take property necessary for the purpose, the necessity of taking particular property for a particular purpose is a judicial one upon which the owner is entitled to be heard." *(Lewis, Eminent Domain, 3d ed., §599.)*
>
> "The company (condemnor) is not the judge of the existence of the necessity." *(Id. §600.)*
>
> "In a California case it is said: 'The question of necessity in a given case involves a consideration of facts which relate to the public, and also to the private citizen whose property may be injured. The greatest good on the one hand and the least injury on the other are the questions to be determined, and these questions are for the jury, in passing on the question of necessity.' In a proceeding by a railroad company to condemn land for a gravel pit it appeared that the taking would be especially injurious to the defendant and the neighborhood, and that there was other property which could be taken without such consequences, and the application was denied. The fact that the company already has property suitably located and available for the purpose may be a sufficient ground for denying the application." *(Id. 601.)*

The maps (R. 699 and 718) show that Johnson already has two roads, from the highway into his 1160-acre tract, over its own lands. What the Oregon Constitution and statute authorizes is a "way of necessity", such as is commonly permitted where the condemnor has no other means of ingress and egress to his isolated property.

Mr. Lewis *(Eminent Domain, 3d ed., § 260)* says:

"Where the constitution sanctions the establishment of 'private ways of necessity,' or 'in cases of necessity,' one cannot be laid out simply because it will be more convenient or less expensive for the applicant, than one on his own land. To create such a necessity as is contemplated, it is probable that the applicant's land would have to be surrounded by the land of others."

In view of the conflict between the decision of the Circuit Court of Appeals and the following authorities, this question should be reviewed.

Gaines v. Lunsford, 120 Ga. 870, 47 S. E. 967; 102 Am. St. Rep. 109.

Chattanooga etc. R. R. Co. v. Philpot, 112 Ga. 153, 37 S. E. 181.

Robinson v. Herring, 20 So. 2d 811, 813.

State ex rel. Stephens v. Superior Court, 111 Wash. 205, 190 P. 234.

State ex rel. Carlson v. Superior Court for Kitsap County, 107 Wash. 228, 181 P. 689.

State ex rel. Miller Logging Co. v. Superior Court, 112 Wash. 702, 191 P. 830.

(Excerpts from the five cases last cited are printed on pages 36-40 of the appendix to petitioner's brief below, marked "Appendix (1) to Brief of Cross-Petitioner" and filed herewith.)

In *Dallas v. Hallock,* 44 Or. 246; 75 P. 204, 206, the Supreme Court of Oregon said:

"Where it is sought to take lands or property of another and appropriate them to a public use or benefit * * * the necessity therefor must not only be averred but proved."

The law of eminent domain should be strictly construed. It is "more harsh and peremptory in its exercise and operation than any other" *(Lewis, §388).*

The brief comments of the court below (R. 747 and 749) do not dispose of the issue of necessity for the taking with any satisfactory degree of finality, and the direction with reference to a new trial (R. 750) leaves doubt, which may perplex the trial court, as to whether the entire issue is to be tried again.

3.

Before setting the cases for new trial, the trial court and counsel are entitled to a decision which will serve as a guide for further proceedings, and prevent the recurrence of errors on which the appeals were based.

(a) The principal objective of the appeals was to obtain a judicial review of the trial court's finding that the taking was for a public use. The attack was not directed against the validity of *Chapter 2, Title 12, O. C. L. A.*, which the court below found to be, in itself, "a proper exercise of eminent domain". Rather, the issues were: (1) Whether that statute, and the Constitutional amendment on which it was based, authorized the taking of Mesabi's property, under the facts and circumstances shown by the record, and (2) even if otherwise susceptible to such interpretation, would such taking violate Mesabi's rights under the *Fourteenth Amendment to the Federal Constitution?* That amendment not only inhibits the Oregon legislature, but also the Oregon courts, and the Oregon people themselves. And its inhibition has the same application to the state and its people as is applicable to the Federal Government under the *Fifth Amendment.*

Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226, 234-239; 41 L. ed. 979, 984-985.

(b) Prior to the jury trial, District Judge Fee had said (opinion of June 27, 1946):

> "Now, as to the rule of damages, I can tell you right now what the rule of damages is, because I have used it consistently for some fifteen years: That is, namely, that the property is appraised before the taking of the road and appraised afterwards, and the difference between the appraisal before and the appraisal afterwards of the fair market value is the amount of damages that you receive."

At the trial, District Judge McColloch apparently concurred in the application of the "before and after" rule (R. 340-342, 353-355, and 358-363). However, Johnson has persistently contended that the measure of damages is the fair market value of the property actually taken, and the jury's awards were so limited, in accordance with later inconsistent and erroneous rulings and instructions of the trial court. On the other hand, although Mesabi followed the "before and after" rule in adducing evidence of value, an unidentified portion of the testimony of one of its appraisers (Morgan, who stated that the fair market value of the tract was $1,397,485.00 before the taking, and $1,196,024.00 after the taking) was stricken by the trial court. Under the decisions of the court below in:

> *Oakland Water Front Co. v. LeRoy,* 282 F. 385, 386-387;
>
> *Puget Sound Power & Light Co. v. City of Puyallup,* 51 F. 2d 688, 697;

the striking of Morgan's testimony was clearly erroneous, and one of Mesabi's principal contentions on appeal was based thereon. The court below entirely mistook the reason for the striking of this testimony (R. 631 and 747-748) and dismissed the issue without any ruling on the application of the "before and after" rule, thereby leaving the way open for recurrence of the same errors in the course of a new trial, and for depriving the owner of just compensation.

(c) Much confusion and uncertainty, in the trial court, resulted from the failure of the condemnor (1) to specify in its complaints the nature and extent of the titles or easements sought to be taken, and (2) to adduce any competent evidence of surveys and locations of the proposed rights-of-way, on the ground. Although the comments of the court below on these issues (R. 748 and 751-752) sustain Mesabi's contentions, there is no indication that the complaints are to be amended, at this late day, so as to take property and rights other than such as have already been taken, or whether (1) Johnson is required to survey and locate the rights of way described in the original complaints, or (2) change the descriptions in the complaints (a) to conform to the property and rights actually taken, or (b) to such property and rights as it may hereafter elect to take. Here, again, the court below leaves the cases in the confused state which prompted the appeals.

(d) The use of the term "right-of-way" to designate quantum of title or extent of interest, or as synonomous with "ordinary" or any other kind of easement, is confusing (R. 747-748, and 751). The law gives, and Johnson sought and actually took, a qualified fee title, or nothing. What the judgments gave is substantially the qualified fee title which railroads ordinarily acquire. Farmers cannot pasture their stock on the right-of-way. The nature of such a title is fully explained in *18 Am. Jur. 745,* and the annotation in *155 A. L. R. 381, 390-405.* The term "right-of-way" indicates a physical segment of land, regardless of the underlying title, which might be a fee simple title, or a mere license. The difference between a "qualified fee" and an "exclusive and unlimited easement" is vague and indefinite, but the latter phrase seems indicative of a superior right because it vests exclusive occupancy for an unlimited time, whereas a qualified fee is terminable for non-user. By reason of *Section 12-206,*

O. C. L. A. (Appendix A), the proper term here is "qualified fee". The court below has added confusion to the issues by its use of the term "right-of-way" (R. 747-749).

(e) After the condemnor has taken an "exclusive" and "unlimited easement" (R. 98), and occupied and used the same for more than a year for its sole and exclusive use and benefit, with the present prospect that Mesabi will continue indefinitely to be deprived of the use of the most feasible route for logging the bulk of the timber on Euchre Creek, it is rather late for Johnson to relinquish the rights acquired and exercised under its judgments, and under *Section 12-409, O. C. L. A.*, and the decision of the court below indicates how Mesabi may be deprived of its property without just compensation (R. 749-750).

(f) The general rule is that a foreign corporation may not condemn lands without specific statutory authority from the local legislature.

29 C. J. S. 814.

23 Am. Jur. 112, Foreign Corporations, §106 (also §186).

Lewis, Eminent Domain (3d ed.) §374.

Fletcher, Cyc. of Corporations, §2908.

Oregonian Ry. Co. v. Oregon Ry. & Nav. Co. (C. C.-Ore.), 23 F. 232, 238.

Helena Power Transmission Co. v. Spratt, 35 Mont. 108; 88 P. 773, 777; 8 L. R. A. (N.S.) 567.

The case of *Northwestern Electric Co. v. Zimmerman,* 67 Or. 150, 135 P. 330, involved a public utility and a different statute, and is not in point here. The court below (R. 745) does not refer to the original *Act of October 21, 1878* (see Appendix B to the foregoing petition) and

apparently was misled by the transposition of *Sections 77-320 and 77-318, O. C. L. A.*, in the process of codification. The decision is in conflict with the decision of this court in *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 36-37; 32 L. ed. 837, 845, wherein it is clearly indicated that the right of eminent domain under this statute is limited to such foreign corporations as are "therein enumerated". The court below, in holding that any foreign corporation may condemn Oregon lands, nullifies the limitations imposed by what is now *Section 77-320, O. C. L. A.*

The original brief, identified as "Appendix (1) to Brief of Cross-Petitioner", and reply brief, identified as "Appendix (2) to Brief of Cross-Petitioner", submitted to the court below, are filed herewith.

CONCLUSION

The court below assumed that Johnson had a right, under the court's liberal interpretation of the Oregon Constitution and statutes, to take such of Mesabi's lands as Johnson might select for the most convenient and economical removal of its timber. The decision indicates that, at this late day, the terms and conditions of the taking may be so modified as to reduce to the minimum the damages for the taking, by reserving to the owner rights which have no practical value. These reservations have no value for the reasons which prompted the rejection of similar reservations in the case of *Coos Bay Logging Co. v. Barclay*, 159 Or. 272, 282-284; 78 P. 2d 672, 676, 677.

A careful reading of the Barclay case shows that no question of necessity for the taking was involved therein, and that the owner was more concerned with the amount of his compensation than with the enforcement of his constitutional rights. Barclay's complaint, that the railroad would have a monopoly "for the removal of billions of feet of timber" on the public domain "and on numerous

tracts owned by other persons", would be equally applicable to any railroad penetrating a remote region. The public use in that case was evident. The case supports Mesabi's contention that, where a limited right is taken, it must be described in the pleadings. The principal issue in the Barclay case involved the unsuccessful attempts of the condemnor to force upon the owners concessions as to joint user, in lieu of the compensation which they were entitled to receive in money.

But the issue here is of broader scope. This Court is asked to pass upon the question of whether a state legislature, or any state or federal court, may sanction the taking of private property for private uses and purposes. The right to abuse the power of eminent domain by such a taking was withheld from the Federal Government by the Fifth Amendment, and withheld from the states by the Fourteenth Amendment.

The following excerpt is quoted from *18 Am. Jur. 633* (Eminent Domain, §4):

> "It is settled, however, that a taking of property which does not comply with the specific clause—that is, a taking for a private use or without just compensation—is a deprivation of property without due process of law (citing *Panhandle E. Pipe Line Co. v. State Highway Commission*, 294 U. S. 613, 79 L. ed. 1090). Accordingly, since the adoption of the Fourteenth Amendment, there is the possibility of a Federal question in every taking by eminent domain under state authority, even if all the requirements of the Constitution of the state are held to have been complied with" (citing nine decisions of this Court).

The Oregon courts have consistently held that "public use" means *use by the public*, and have declined repeatedly to broaden the meaning of that term to include "public welfare" or "private benefit". They have held, also, that whether or not a use is public is a judicial question to be

determined from the facts and circumstances of each case. Under those decisions, Johnson has no more right to condemn a road to its sawmill than it would have to condemn a site for its sawmill.

Nevertheless, the court below, mistaking the real issue, assumed that the legislature could lawfully authorize the taking of private property for private use, and did not pass upon an issue which, according to practically unanimous views of all other courts, is reserved for judicial determination. In fact, it may safely be assumed that the Oregon legislature, in enacting a statute of such apparently broad scope, expected the state courts to continue to exercise their asserted powers to keep the exercise of eminent domain within well-recognized limits.

For this reason, and for the further reason that the decision of the court below has left the issues in such a state of confusion as to jeopardize your petitioner's rights, it is respectfully submitted that the writ of certiorari should be granted.

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